

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHANDRA VALENCIA SMITH-ANTHONY,

Defendant-Appellant.

FOR PUBLICATION

May 3, 2012

No. 300480

Oakland Circuit Court

LC No. 2010-232465-FH

Advance Sheets Version

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

WHITBECK, J. (*dissenting*).

The majority here decides that defendant, Chandra Valencia Smith-Anthony, did not commit larceny from the person of another¹ because her conduct did not fall within the definition of that crime. I disagree, and I respectfully dissent.

This is a case with only one witness, a Macy's loss-prevention detective named Khai Krumbhaar. Krumbhaar's uncontradicted testimony established that Smith-Anthony selected a box of White Diamonds perfume from a display in the women's fragrance department at Macy's, then walked through other areas of the store, ultimately pushed the White Diamonds box into a bag, and left the store without paying for the perfume.

As the majority sets out, the statute provides, "Any person who shall commit the offense of larceny by stealing *from the person of another* shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."² Larceny from the person is a lesser included offense of robbery,³ and it is "the lack of force or violence [that] distinguishes larceny from a person from the offense of robbery."⁴ The operative phrase in the statute is "from the person of another," and the courts have interpreted this phrase as meaning that the property that

¹ MCL 750.357.

² *Id.* (emphasis added).

³ *People v Beach*, 429 Mich 450, 484; 418 NW2d 861 (1988).

⁴ *People v Perkins*, 262 Mich App 267, 272; 686 NW2d 237 (2004), *aff'd* 473 Mich 626 (2005).

is the subject of the larceny must be “taken from the person *or from the person’s immediate area of control or immediate presence.*”⁵

The person in question here is Krumbhaar, as caselaw holds that a defendant may be found guilty of robbery, or the lesser included offense of larceny from the person, if the defendant takes property owned by a business (such as Macy’s) in the immediate presence of an employee (such as Krumbhaar) who oversees or protects the property.⁶ As a loss-prevention detective, Krumbhaar clearly oversees and protects Macy’s property.

But there is no assertion, and no evidence, that Smith-Anthony took the White Diamonds box from Krumbhaar’s actual person. The only question, then, is whether there was sufficient evidence for a jury to conclude that when Smith-Anthony took the White Diamonds box and stuffed it into her bag, she was in Krumbhaar’s “immediate area of control or immediate presence.” (I agree with the majority’s view that Smith-Anthony completed the act of larceny when she placed the White Diamonds perfume in her shopping bag.) Viewing Krumbhaar’s testimony, as we must, in a light most favorable to the prosecution,⁷ I believe there was sufficient evidence to support the guilty verdict that the jury returned on the charge of larceny from the person, a guilty verdict for which the trial court sentenced Smith-Anthony as a third-offense habitual offender⁸ to 4 to 20 years in prison. I would affirm the jury’s verdict and the trial court’s sentence.

I. FACTS

I accept the majority’s statement of facts with one major exception, which relates to Krumbhaar’s testimony about what happened after she observed Smith-Anthony’s “nervous” behavior on the monitor in the loss-prevention office. At the risk of being tedious, I set out Krumbhaar’s testimony verbatim:

Q. Okay, and so based on her behaviors what, if anything, did you do?

⁵ *Id.* at 271-272 (stating that the elements of larceny from the person are “(1) the taking of someone else’s property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person’s immediate area of control or immediate presence”).

⁶ *People v Gould*, 384 Mich 71, 80; 179 NW2d 617 (1970); See *People v Rodgers*, 248 Mich App 702, 712-713; 645 NW2d 294 (2001) (noting that for purposes of an armed robbery analysis, the court must consider whether an employee had a greater right to the property than the defendant).

⁷ *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

⁸ MCL 769.11.

A. Based on her behaviors I turned the monitor to follow her as she watched—walked through the men's department and approached the men's fragrance counter.

Q. Okay, and then what did you see?

A. At the men's fragrance counter I observed her apparently in conversation with one of the associates.

Q. Okay.

A. She placed her bag on the counter, stood there with the associate for several minutes and then took her bag and walked from the men's fragrance department into the women's fragrance department.

Q. Okay. Now, are you still in the office where the closed circuit television is at this point?

A. At this point I was.

Q. And at that time in the morning were there any other loss prevention officers on duty at that time?

A. There were not. The next detectives didn't come in until 11:00.

Q. Okay. So what happened next after you saw this person or this female go into the female or the women's fragrance section?

A. I noticed the lady walk from the men's fragrance department around into the women's fragrance department. In that department she walked around the outside of the area and then walked to a White Diamonds fragrance display and she selected a large gold White Diamonds box.

Q. Okay, White Diamonds is a cologne—

A. It's a—

Q. —or perfume?

A. It's a fragrance.

Q. Okay, and you said that she selected a large gold gift box?

A. Yes, Ma'am.

Q. Okay, so it wasn't just a single box containing one bottle, it was a larger box?

A. It was a larger box that has one fragrance bottle and then three various creams that are all scented with White Diamonds.

Q. Okay. What, if anything, did you do at that point?

A. At that point, based on her behavior and based on the fact that I was the only detective on at the time, I went to the floor to gain floor observation. My office is right around the corner from where the women's fragrance department is.

It took me fifteen, twenty seconds to get in visual range of her again and she still had the box in her hand.

Q. Okay. Now, now at this point the box is visible and in her hand?

A. Yes.

Q. Okay. When you say that you went to floor to gain sight of her—

A. Yes.

Q. —what did you do once you made it to the floor?

A. Because we're plain clothes detectives I pretended to—that I was shopping in the area and kept visual—I kept watching her.

Q. Is that part of your role as a loss prevention officer? This is something that you do—

A. Yes.

Q. —routinely?

A. We wear plain clothes.

Q. I'm sorry, what?

A. We wear plain clothes, we just wear normal clothes like we're shopping.

Q. Okay.

A. *So I was able to stay fairly close to her in the fragrance department without attract—without her noticing me.*

Q. And what, if anything, did you observe?

A. I observed—I observed two different associates approach her and offer assistance *and she both times said that she did not need assistance.* She walked from the women's fragrance department into the women's shoes department and

sat down. There, I saw one of the sales people approach her *and she asked for a pair of shoes—*

Q. Okay.

A. —and she tried on some shoes in the women's shoes department. At that point she had her tote bag and the plastic shopping bag and the White Diamonds gift box next to her on a chair.

Q. Okay, and what, if anything, did you notice at that point?

A. At that point she still was—she still looked very, very nervous. She was moving a little bit jerkily and she was still kind of pulling the gift box close to her and she was kind of edging it towards her bags.

Q. What happened next?

A. She got up from her chair in the shoe department and she picked up all of her bags and the gift box and she was holding the gift box down near the opening of the brown shopping bag.

Q. Okay.

A. And she walked—she rose, she got up from her chair and she walked through women's shoes into the—(undecipherable)—op—optical and at that point she pushed the bag down—or the box down into her shopping bag.

Q. Okay. Now when you're talking about the shopping bag are you referring to the tote bag that you described or are you referring to the brown transparent—is that the word you used, transparent?

A. Yes.

Q. The brown grocery bag?

A. The grocery bag.

Q. The brown grocery bag, okay. And what happened next?

A. At that point it was in the grocery bag but the box was larger than the bag *so I could still see about half the box sticking out.* At that point she walked around the corner from optical into fashion jewelry and I—I followed her through women's shoes and *I stopped to check that she had not purchased the shoe—or the box there. I had not observed her passing money or credit cards.*

Q. Okay.

A. So I knew that she hadn't paid for the box.

Q. Okay. And then what happened?

A. I followed her around fashion jewelry and she stopped and stood there for a minute, so I stayed back giving her some space. There were several open registers nearby so I wanted to see if she was going to pay for it, but she did not, she went out walking very quickly, she walked out our fashion jewelry door and out—

Q. Okay, now when you—

A. —into the mall.

Q. I'm sorry?

A. She walked out into the mall.^[9]

There are several things that stand out from this testimony. First, Krumbhaar personally, and not through the monitor in Macy's loss-prevention office, saw Smith-Anthony in the women's fragrance department with the White Diamonds box in her hand. In other words, Smith-Anthony was within Krumbhaar's line of sight.

Second, Krumbhaar got "fairly close" to Smith-Anthony while she was in the women's fragrance department. In fact, Krumbhaar was close enough to hear two different salespersons approach Smith-Anthony and offer assistance and to hear Smith-Anthony decline assistance both times.

Third, Krumbhaar followed Smith-Anthony as she walked into the women's shoe department and remained close enough to Smith-Anthony that she could hear Smith-Anthony when she asked for a pair of shoes.

Fourth, Krumbhaar saw Smith-Anthony place the White Diamonds box into a bag she was carrying, the point at which the majority concludes that Smith-Anthony completed her act of larceny. In fact, Krumbhaar was close enough to Smith-Anthony to observe that about half of the White Diamonds box was sticking out of the bag.

Fifth, Krumbhaar continued to follow Smith-Anthony through the store and out into the mall, and remained close enough that she was able to observe that Smith-Anthony did not pass money or credit cards to pay for the perfume she carried in her bag.

These facts are undisputed. Indeed, I note that defense counsel devoted no time in cross-examination to the question of Krumbhaar's physical location at the time Smith-Anthony placed the White Diamonds box in her bag. With these facts in mind, the issue remains the same: Was there sufficient evidence for a jury to conclude beyond a reasonable doubt that Smith-Anthony

⁹ Emphasis added.

was within Krumbhaar's "immediate area of control or immediate presence" when Smith-Anthony completed the larceny at Macy's by placing the White Diamonds box in her bag?

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

As I noted, when reviewing the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution.¹⁰ This Court determines whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.¹¹

B. LEGAL STANDARDS

Again, as I noted, to establish that "the property was taken from the person or from the person's immediate area of control or immediate presence,"¹² the prosecution does not have to show that the victim owned the property taken.¹³ Rather, the prosecution need only present sufficient evidence to show that the victim's right to possess the property was superior to the defendant's right to possess it.¹⁴ A defendant may be found guilty of robbery, or the lesser included offense of larceny from the person, if the defendant takes property owned by a business in the immediate presence of an employee who oversees or protects the property.¹⁵ Thus, the jury here could find Smith-Anthony guilty of larceny from the person if it could reasonably find that she took the White Diamonds box, owned by Macy's, in the immediate presence of an employee, Krumbhaar, who oversaw and protected that property.

C. ANALYSIS

1. CLEARING THE UNDERBRUSH

There is undisputed evidence that at the time of the crime in question, Macy's owned the perfume gift set and that Krumbhaar was a Macy's loss-prevention detective. As a Macy's loss-prevention detective, Krumbhaar was an employee responsible for protecting Macy's property.¹⁶

¹⁰ *Tombs*, 472 Mich at 459; *Ericksen*, 288 Mich App at 196.

¹¹ *Ericksen*, 288 Mich App at 196.

¹² *Perkins*, 262 Mich App at 272.

¹³ *Rodgers*, 248 Mich App at 711.

¹⁴ *Id.*

¹⁵ *Gould*, 384 Mich at 80; *Rodgers*, 248 Mich App at 712-713.

¹⁶ See *Gould*, 384 Mich at 80; *Rodgers*, 248 Mich App at 712-713.

Therefore, Krumbhaar's right to possess the property was superior to Smith-Anthony's right to possess the property before paying for it.¹⁷

The majority blurs the basic issue by asserting that no testimony "supported that Krumbhaar ever possessed the fragrance box" But the prosecution never asserted that Krumbhaar physically possessed the White Diamonds box. Caselaw makes it absolutely clear, it is Krumbhaar's *right* to possess the property—as an employee responsible for protecting Macy's property—that is the basic underpinning of the case. And it is also absolutely clear that Krumbhaar's *right* to possess the White Diamonds box was superior to that of Smith-Anthony.

2. IMMEDIATE AREA OF CONTROL OR IMMEDIATE PRESENCE

The majority asserts that "[a]lthough Krumbhaar could see defendant commit the larceny, the prosecutor failed to establish that defendant ever came close enough to Krumbhaar to invade Krumbhaar's personal space." Without speculating about the meaning of the words "personal space" in this context, I find nothing in Krumbhaar's testimony that supports this assertion. I note that in performing our review function, this Court is not to make decisions regarding a witness's credibility. The jury found Krumbhaar to be credible regarding what occurred within the Macy's store, and we are not to invade the province of that jury.¹⁸ Further, we are not to determine, when reviewing a criminal conviction on sufficiency of the evidence grounds, whether we would have reached the same result as the jury had we been sitting as jurors.¹⁹ Rather, our review is limited to the question of whether there was sufficient evidence from which a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.²⁰

Krumbhaar's testimony established that she was "fairly close" to Smith-Anthony. In fact, she was close enough not only to *see* Smith-Anthony but also to *hear* her twice decline assistance from salespersons in the women's fragrance department and to *hear* Smith-Anthony when she asked for a pair of shoes in the women's shoe department. Viewing this testimony in a light most favorable to the prosecution, I conclude that there was sufficient evidence from which a jury could find that the prosecution had proved beyond a reasonable doubt that Smith-Anthony was in Krumbhaar's "immediate area of control or immediate presence".

In my view, when a loss-prevention detective, whose job it is to protect his or her employer's property, is close enough to a defendant to *see* that defendant commit the crime of larceny from the person and to actually *hear* that defendant speak to other employees in the store, the defendant is as a matter of law within the loss-prevention detective's immediate area of

¹⁷ See *Rodgers*, 248 Mich App at 712.

¹⁸ *People v Petrosky*, 286 Mich 397, 400; 282 NW 191 (1938).

¹⁹ See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (noting that a judge does not sit as a thirteenth juror regarding witness credibility).

²⁰ *Ericksen*, 288 Mich App at 196.

control or immediate presence.²¹ Thus, given that both of these criteria are satisfied here, there was sufficient evidence to support the jury's verdict.

I would affirm.

/s/ William C. Whitbeck

²¹ See *People v Beebe*, 70 Mich App 154, 159; 245 NW2d 547 (1976).